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No. 04-222

IN THE

Supreme Court of the United States

DASSAULT AVIATION,

Petitioner,

v.

BEVERLY ANDERSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF THE ORGANIZATION FOR INTERNATIONAL INVESTMENT AND THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF THE ORGANIZATION FOR INTERNATIONAL INVESTMENT AND THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37.2(b) of the Rules of this Court, the Organization for International Investment and the Chamber of Commerce of the United States move for leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. Counsel for the Petitioner has consented to the filing of this brief, but counsel for the Respondent has withheld consent.

The Organization for International Investment ("OFII") is the largest business association in the United States representing the interests of U.S. subsidiaries of multinational companies before all branches and at all levels of government. OFII's member companies operate throughout the United States, employing hundreds of thousands of workers in thousands of plants and locations throughout the United States, as well as in many foreign countries, and are affiliates of companies transacting business in countries around the world.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than three million U.S. businesses and organizations of every size, in every business sector, and from every region of the country. While the Chamber's membership includes most of the country's largest companies, 96 percent of its members are small businesses with fewer than 100 employees. The Chamber's members transact business in all or nearly all of the states of the United States, as well as in a large number of countries around the world. An important function of the Chamber is to advocate its members' interests in matters of

national concern before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

These organizations regularly file briefs as *amici curiae* in cases such as this one that raise issues of vital concern to the business community. In this case, OFII and the Chamber seek to assist the Court in exploring the practical consequences for interstate and international commerce of the due process limits on exercising *in personam* jurisdiction over nonresident defendants.

OFII and the Chamber believe that the Petition in this case raises issues that are critical to the clarification of the due process limits on *in personam* jurisdiction. The Petition has detailed the chaotic state of the law in the lower courts over the constitutional limits on the exercise of *in personam* jurisdiction, and, in particular, on the assertion of *in personam* jurisdiction over nonresident parent corporations based solely on the forum contacts of separately incorporated subsidiaries. This case provides the Court with a singular opportunity to address and resolve this doctrinal confusion. Members of OFII and the Chamber depend on a stable and predictable legal framework to conduct business around the globe. In their view, the decision below undermines that framework by permitting states to subject nonresident corporations to *in personam* jurisdiction based only on the forum contacts of affiliated corporations, without any basis for disregarding their separate corporate existences.

The brief of *amici curiae*, however, offers a broader perspective than that of the Petitioner on the importance of this Court's review in the instant case. In the accompanying brief, *amici* focus on the negative consequences for international trade and investment in the United States of this doctrinal confusion and of the specific approach adopted by the Eighth Circuit. OFII and the Chamber believe that this perspective is not only relevant but indeed vital to a full appreciation of the need for review by this Court.

For the foregoing reasons, the motion of OFII and the Chamber for leave to file the accompanying brief as *amici curiae* should be granted.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE*

Under cover of the accompanying motion pursuant to Rule 37.2(b) of the Rules of this Court, the Organization for International Investment and the Chamber of Commerce of the United States respectfully submit this brief as *amici curiae* in support of Petitioner seeking a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Eighth Circuit in this case.[1]

As discussed at greater length in the accompanying motion, *amici curiae* are business associations with a substantial interest in ensuring stable and predictable legal regimes affecting the conduct of international trade and investment. The Organization for International Investment ("OFII") is the largest business association in the United States representing the interests of U.S. subsidiaries of multinational companies. The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation with an underlying membership of nearly three million U.S. businesses and organizations, which transact business in all or nearly all of the states of the United States, as well as in a large number of countries around the world.

Amici curiae view the jurisdictional ruling at issue in this case not only as contributing to an environment of legal uncertainty, but also as a serious threat to their members' business operations. Any decision with such global implications warrants this Court's intervention. The reasoning of the decision below would vastly and unfairly increase the *amici*'s members' exposure to suit in jurisdictions with which they have no sustained or regular

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Further, no counsel for either party has authored this brief in whole or in part.

contacts, simply by virtue of the national or multinational reach of their corporate affiliations.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Dassault Aviation's petition clearly demonstrates that the circuit court's decision in *Anderson* v. *Dassault Aviation*, 361 F.3d 449 (8th Cir. 2004), conflicts with precedents of this Court and is emblematic of confusion among the lower courts concerning the due process limits on *in personam* jurisdiction over nonresident corporate defendants. *Amici curiae* readily agree with the arguments advanced in the Petition, and therefore urge this Court to grant the petition for a writ of certiorari for the reasons stated therein. *Amici*, however, are equally concerned with the broad commercial implications of this confusion and of certain particularly worrisome aspects of the Eighth Circuit's decision.

In this brief, *amici curiae* will focus on the negative consequences for the conduct of international trade and investment that result from the confusion among the lower courts surrounding the due process limits on exercising *in personam* jurisdiction over nonresident corporate defendants. Lower courts around the country have adopted an assortment of widely varying and irreconcilable tests for deciding when to impute the forum contacts of a subsidiary corporation to a foreign parent corporation that has no direct or sustained contacts of its own with that forum, for the purpose of asserting jurisdiction over that parent corporation. This pervasive confusion not only leads to frequent litigation of cases concerning the exercise of *in personam* jurisdiction over such a defendant, but also undermines the stable and predictable legal environment crucial to the conduct of global business.

Amici also wish to highlight the serious risks to national and global commerce if the Eighth Circuit's expansive theory

of *in personam* jurisdiction is allowed to stand and guide the assertion of jurisdiction in the lower courts. The Eighth Circuit relied on several factors present in a typical parent-subsidiary relationship to find that a nonresident foreign parent corporation had a "close, synergistic" relationship with its subsidiary. Based on that finding, the court proceeded to attribute the subsidiary's forum contacts to the parent (which had no contacts of its own with that forum), and therefore to assert personal jurisdiction over the parent corporation. Thus, under the Eighth Circuit's approach, a nonresident parent corporation with no direct contacts with a forum would essentially be subject to *in personam* jurisdiction in *any* state where one of its subsidiaries does business. Such an approach would greatly increase a foreign parent company's exposure to suit as well as increase the costs of doing business, thereby discouraging investment in the United States.

ARGUMENT

The Eighth Circuit held that the district court could maintain *in personam* jurisdiction over Dassault Aviation, a French manufacturer of business jets with no forum contacts of its own, by virtue of, *inter alia*, the forum contacts of Dassault Falcon Jet, a separately incorporated subsidiary. The jurisdictional decision below extends the reach of Arkansas' long-arm statute well beyond the limits prescribed by the Constitution's Due Process Clause. Those limits were outlined by this Court in *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945), *World-Wide Volkswagen* v. *Woodson*, 444 U.S. 286 (1980), and their progeny, but have been applied inconsistently by the lower courts, as the Petition ably discusses in great detail. See Pet. 12-24. *Amici curiae* believe that this confusion alone warrants the Court's review, and they will not repeat the Petitioner's arguments here. Instead, *amici* wish to draw the Court's attention to the significant negative consequences for

business and investment in the United States that arise from the confusion prevailing in the lower courts. In addition, *amici* wish to focus on the negative consequences for national and global businesses of the particular species of jurisdictional overreaching endorsed by the Eighth Circuit in this case.

I. CONFUSION AMONG THE LOWER COURTS THREATENS A STABLE AND PREDICTABLE LEGAL ENVIRONMENT FOR NATIONAL AND INTERNATIONAL BUSINESS.

The Petition presents an opportunity for this Court to address and resolve two key jurisdictional issues that have been the subject of doctrinal and decisional conflicts among the lower courts. By reviewing the decision below, the Court could establish a more stable and predictable legal environment in which global companies can operate.

Some courts, following this Court's decisions in *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, 267 U.S. 333 (1925), and *United States* v. *Bestfoods*, 524 U.S. 51 (1998), have refused to attribute a subsidiary's contacts to its parent so long as corporate formalities have been maintained, even if only formally. See Pet. 13-14. Many other courts have rejected the standard in *Cannon*, arguing that this Court's more recent decision in *International Shoe* controls. See *id.* at 14-16.

But even the courts that purport to apply *International Shoe* use very different approaches. Some have imputed the forum contacts of a subsidiary to a nonresident parent corporation if circumstances would permit the courts to pierce the corporate veil of the subsidiary under tests specified in state corporations law. See *id.* at 14; see, *e.g.*, *Central States, Southeast & Southwest Areas Pension Fund* v. *Reimer Express World Corp.*, 230 F.3d 934, 943-45 (7th Cir. 2000). State law, of course, carries with it a welter of different approaches. There is no uniform standard. Courts have

embraced a number of different tests for when they will actually pierce a corporate veil—*e.g.*, instrumentality cases, alter-ego cases, agency cases, etc. Thus, clarification is also much needed as to when corporate veil-piercing scenarios permits the exercise of *in personam* jurisdiction.

Still other courts have adopted more novel approaches to determining when to impute the forum contacts of a subsidiary to its parent, without reference to the legal doctrines of corporate veil-piercing. For example, in the decision below, the Eighth Circuit relied on the existence of a "close, synergistic" or "symbiotic" relationship between the parent and the subsidiary to impute the subsidiary's forum contacts to the parent corporation, thereby allowing the court to assert *in personam* jurisdiction over the nonresident parent. Likewise, a Texas court of appeals recently asserted personal jurisdiction over a nonresident parent, for claims arising in Mexico, after attributing the forum contacts of its subsidiary to the parent under a "single business enterprise" theory. See *Bridgestone Corp.* v. *Lopez*, 131 S.W.3d 670, 681-86 (Tex. App. 2004). According to the Texas court, this theory applies "when corporations integrate their resources and operations to achieve a common business purpose." *Id.* at 681.

Second, there is considerable confusion among the lower courts with respect to the application of the jurisdictional standard outlined in this Court's decisions in *International Shoe*, *World-Wide Volkswagen*, and their progeny. Lacking recent guidance from this Court, the lower courts have adopted varied and often inconsistent approaches for applying the jurisdictional standard first elaborated in this Court's decision in *International Shoe*. It is axiomatic that a state can exercise *in personam* jurisdiction over a defendant, consistent with due process, when that defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U.S. at 316.

As discussed in the Petition, many courts have interpreted this requirement of *International Shoe* and its progeny to require a two-step analysis—determining first whether a defendant has certain "minimum contacts" and second whether the exercise of such jurisdiction would offend "traditional notions of fair play and substantial justice." See Pet. 17-22. But not all courts have followed this two-step approach. In the decision below, for example, the Eighth Circuit employed a five-factor balancing test to determine whether it could properly exercise *in personam* jurisdiction over Dassault Aviation, with the sufficiency of a defendant's contacts as merely one of the factors to be considered. *Id.* at 17-20.

The current state of confusion among the lower courts on both points denies businesses any assurance that they can rely on their corporate structures to order their business activities or manage attendant risks. It therefore poses a serious threat to the stable and predictable legal environment that is crucial to the operation of multinational companies in the United States, and to a healthy commercial and economic environment. *Amici*'s members require predictable legal rules in order to operate their businesses effectively, and the current state of legal disarray artificially distorts business decision-making. Overseas businesses that are concerned that their contacts with U.S. subsidiaries will expose them to the risks of forum shopping will either refuse to do business in this country or alter their methods of distributing goods and services without regard to consumer preferences. This Court has recognized the value of predictability resulting from an "'orderly administration of the laws.'" *World-Wide Volkswagen*, 444 U.S. at 297 (quoting *International Shoe*, 326 U.S. at 319).

The lower courts' use of a variety of tests also encourages forum shopping by plaintiffs looking for the most favorable treatment for the specific facts of their cases. Indeed, that was the situation in the present case. Respondent first filed

suit in the Western District of Michigan against Dassault Aviation, Dassault Falcon Jet, and Honeywell, Inc. (the manufacturer of the allegedly defective autopilot that caused the accident). See generally Pet. App. 22a-29a. The district court in Michigan, however, held that it did not have personal jurisdiction over Dassault Aviation, and granted Dassault Aviation's motion to dismiss.[2] See *id.* at 22a, 29a. Respondent then turned to the Eastern District of Arkansas, where Respondent re-filed her suit against Dassault Aviation—and benefited from the Eighth Circuit's more generous jurisdictional test. Likewise, thanks to its expansive rule, the Eighth Circuit will continue to attract litigants aspiring to reach into the deep pockets of parent companies outside the forum, based solely on the activities of separate but affiliated entities.

II. THE EIGHTH CIRCUIT'S DECISION CONSTITUTES JURISDICTIONAL OVERREACHING THAT INTERFERES WITH THE CONDUCT OF INTERNATIONAL BUSINESS.

As much as *amici* are concerned about the confused state of the law of personal jurisdiction, they are particularly troubled by the specific approach adopted by the Eighth Circuit because it poses grave threats to the conduct of national and global commerce.

For *amici*, the alarming aspect of the Eighth Circuit's decision was its rationale for asserting *in personam* jurisdiction over Dassault Aviation, a nonresident corporation with no contacts of its own with that forum, based solely on the forum contacts of its separately incorporated subsidiary, Dassault Falcon Jet. The Eighth Circuit's approach is disconcerting not only because it has the potential of rendering key protections of the corporate form effectively

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[2] Respondent's suit against Dassault Falcon Jet and Honeywell has since been transferred to the Eastern District of Arkansas and consolidated with the action below against Dassault Aviation.

meaningless, but also because it carries serious implications for the operation of normal, run-of-the-mill parent-subsidiary relationships.

In exercising personal jurisdiction over Dassault Aviation, the Eighth Circuit first rejected the district court's finding that a subsidiary's contacts could be imputed to a nonresident parent corporation only when that subsidiary's corporate veil could be pierced as a matter of state law. The circuit court found that "neither physical presence in Arkansas nor piercing Dassault Falcon Jet's corporate veil is required to establish the minimum contacts necessary for the exercise of personal jurisdiction in Arkansas." Pet. App. 5a.

The Eighth Circuit's approach to *in personam* jurisdiction therefore deliberately disregards the "general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries." *Bestfoods*, 524 U.S. at 61. It also ignores the "equally fundamental principle of corporate law," that a subsidiary's corporate veil may be pierced only "when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf." *Id.* at 62.

These two principles serve to encourage investment by limiting a shareholder's liability to its investment, while at the same time ensuring that that protection is not abused. However, under the Eighth Circuit's approach, companies would be stripped of these crucial protections and rights that are part and parcel of establishment under the corporate form. The Eighth Circuit's approach would effectively eliminate the ability of foreign parent companies, like Dassault Aviation, to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 US at 297. Such an outcome will necessarily discourage investment in the U.S. market.

In asserting *in personam* jurisdiction over Dassault Aviation, the Eighth Circuit relied on the "close, synergistic relationship that is not an abuse of the corporate organizational form" between Dassault Aviation and Dassault Falcon Jet to impute Dassault Falcon Jet's forum contacts to Dassault Aviation. Pet. App. 5a. This "close, synergistic relationship" between Dassault Aviation and Dassault Falcon Jet was also later referred to by the Eighth Circuit as "closely intertwined" and "symbiotic." *Id.* at 7a, 9a.

The approach adopted in the decision below is especially troubling to *amici* because the Eighth Circuit found a "symbiotic" relationship to exist in this case solely by reference to several factors that are commonplace to a normal, run-of-the-mill parent-subsidiary relationship. The circuit court found that Dassault Aviation "*benefit[ed] greatly* from Dassault Falcon Jet's exclusive distribution of its business jets throughout the western hemisphere, and Dassault Aviation ha[d] a *clear awareness of* and *interest in* its subsidiary's substantial operations in Arkansas." Pet. App. 5a (emphasis added). Moreover, this awareness of and interest in Dassault Falcon Jet was evidenced by, *inter alia*, informational statements about Dassault Falcon Jet's operations in Dassault Aviation's Annual Report and on a website jointly operated by Dassault Aviation and Dassault Falcon Jet. *Id.* at 5a-7a.

It simply cannot be the case, however, that the fact that a foreign parent corporation is aware of, or benefits from, or is interested in its subsidiary's operations, could justify the imputation of that subsidiary's contacts to a nonresident parent corporation. Indeed, it is doubtful that a parent corporation would ever willingly establish a subsidiary where it would not be aware of the subsidiary's operations or intend to benefit from them. Under such an expansive theory, all parent-subsidiary relationships would constitute "close, synergistic" or "symbiotic" relationships. It is hard to imagine how in the future *any* nonresident parent corporation with a subsidiary with business activities in a particular state

could ever avoid having the subsidiary's forum contacts imputed to it under such a theory. Thus, multinational corporations may soon find themselves vulnerable to suit anywhere in the country, even if they themselves do business nowhere in the country.

Even more, the Eighth Circuit pointed to the fact that both companies used "Dassault" in their name and shared a common logo as part of an attempt to "consolidate the image and operations of the two companies" and as part of a "unified marketing strategy." Pet. App. 7a-8a. Additionally, the circuit court noted that the President and CEO of Dassault Falcon Jet were also officers and directors of Dassault Aviation and that the companies shared a website. *Id.* at 7a. Many, if not most, parent corporations and their subsidiaries, however, will employ the same word in their names and use a common logo. Likewise, it is not unusual for such companies to have shared directors and officers, or a common website. Indeed, even companies not tied by equity stakes may share such features. These facts relied on by the Eighth Circuit do not suggest anything out of the ordinary in commercial relationships and should not serve as a basis for the assertion of personal jurisdiction.

Indeed, a formula this imprecise, which could well describe any national or multinational affiliation of businesses, including even those not formally linked by equity stakes, is itself problematic and, in fact, could lead to absurd results. Consider, for example, a situation in which Dassault Aviation engaged in the same business activities—selling its jets to a separate entity that finishes them according to a customer's specifications, and allowing its name to be used by the separate entity in marketing the jets. *Amici* do not believe anyone would seriously argue that Dassault's ties to that separate corporation could lead to the imputation of that corporation's forum contacts to Dassault for purposes of allowing a court to exercise long-arm jurisdiction. It should follow then that the same conduct undertaken through a

subsidiary should lead to the same result—no jurisdiction over the foreign corporation. But the Eighth Circuit effectively penalizes the use of subsidiaries for no legitimate reason.

The Eighth Circuit's approach, if permitted to stand and to influence other courts around the country, would greatly increase a nonresident parent corporation's potential for being sued, thereby increasing the costs of doing business. This could result in severe consequences for business and investment in the United States.

Continued reliance on such an expansive theory would discourage direct foreign investment in Arkansas and in the states of the Eighth Circuit. In deciding whether to do business in Arkansas (or another state in the Eighth Circuit), a foreign parent corporation would now have to factor in the serious possibility that it could be sued in Arkansas for matters unrelated to its own U.S. activities. Instead, corporate groups, or even companies looking to work closely with (unaffiliated) business partners, may well look to nearby states that do not employ such a loose standard.

In addition to the disincentive such an approach would provide for foreign investment in an Eighth Circuit state, its impact could be much broader. Under the Eighth Circuit's theory of *in personam* jurisdiction, multinational companies would face the prospect that any U.S. subsidiary could serve as a conduit for unlimited jurisdiction over the foreign parent—a possibility that may well discourage participation in the U.S. market altogether.[3] According to a recent Department of Commerce survey, in 2002, majority-owned U.S. subsidiaries of foreign corporations employed over 5.4

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[3] The United States has expressed similar concerns in other cases involving the overreaching of general jurisdiction. *See Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 425 n.3 (1984) (Brennan, J., dissenting) (noting the position of the United States regarding the risks of deterring U.S. purchasing by foreign companies).

million workers in the United States, accounting for 4.8 percent of the country's jobs and 11.8 percent of the country's manufacturing jobs. See William J. Zeile, U.S. Dep't of Commerce, *Operations of U.S. Affiliates of Foreign Companies*, 192, 202-03 tbls.5, 6 (Aug. 2004), *available at* http://www.bea.gov/bea/ARTICLES/2004/08August/0804FDIUS.pdf. Threats to beneficial business activity of this magnitude must be taken seriously.

Finally, adopting the Eighth Circuit's novel approach could also lead to serious concerns of international "reciprocity" for U.S. companies doing business abroad through locally incorporated subsidiaries. The Eighth Circuit's lack of restraint in the exercise of jurisdiction could well lead courts of other countries to adopt similarly expansive jurisdictional approaches, to the detriment of U.S. companies doing business abroad through local subsidiaries of their own.

The Eighth Circuit's expansive approach to jurisdiction, therefore, poses risks for the nation's interests as a whole. A uniform rule is needed that provides greater predictability, respects the corporate form as a legitimate means of organizing global business, and respects the appropriate limits of U.S. jurisdiction under the Due Process Clause. Such a rule will only emerge through this Court's prompt intervention.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully ask this Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

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